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Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Revenue Technologies Corporation

Serial No. 76/153,429

Douglas W. Kenyon of Hunton & Williams for Revenue Technologies Corporation.

Linda M. Estrada, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

Before Seeherman, Hanak and Bucher, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Revenue Technologies Corporation has appealed from the final refusal of the Trademark Examining Attorney to register MARKETPRICE for "business consulting services, namely, professional advisory and consultation for businesses, especially, but not limited to, those with an electronic presence, in the field of product and service pricing," in International Class 42.¹ Registration has been refused pursuant to Section 2(e)(1) of the Trademark Act, 15

¹ Application Serial No. 76/153,429, filed October 25, 2000, and asserting first use and first use in interstate commerce at least as early as September 1, 2000.

U.S.C. 1052(e)(1), on the ground that applicant's mark is merely descriptive of its recited services.

Applicant and the Trademark Examining Attorney have filed briefs. Applicant did not request an oral hearing.

We reverse the refusal to register.

A mark is merely descriptive, and therefore unregistrable pursuant to the provisions of Section 2(e)(1) of the Trademark Act, if it immediately conveys knowledge of the ingredients, qualities or characteristics of the goods or services with which it is used. A mark is suggestive, and therefore registrable on the Principle Register without a showing of acquired distinctiveness, if imagination, thought or perception is required to reach a conclusion on the nature of the goods or services. See In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). The question of whether a particular term is merely descriptive must be determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which the mark is used, and the significance that the mark is likely to have on the average purchaser encountering the services in the marketplace. See In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215 (CCPA 1978); and In re Engineering Systems Corp., 2 USPQ2d 1075 (TTAB 1986).

It is the Trademark Examining Attorney's position that MARKETPRICE immediately conveys information about a characteristic or feature of applicant's business consultation services. In support of this refusal the Trademark Examining Attorney has submitted a dictionary definition of the term "market price" as well as LEXIS/NEXIS database evidence that she contends supports this position.

The term "market price" is defined as "the prevailing price at which merchandise, securities or commodities are sold."² The Trademark Examining Attorney has submitted a number of excerpts retrieved from the LEXIS/NEXIS database in which the term "market price" is used in a variety of contexts. However, other than those articles explicitly referencing applicant's proprietary goods and services, the remaining two hits are in no way helpful to the Office's position. One is about the need for a home seller to select a realistic asking price for real estate listings, while the second deals with an FBI investigation in 1999 of a "unique," decades old pricing program used by a Canadian distributor of semiconductors.

Applicant concedes that "[t]he words 'market' and 'price' do relate in some way to the services, but the

² The American Heritage Dictionary of the English Language, (3d ed. 1992).

purpose of the services here is not to arrive at what is commonly referred to as the 'market price' of a product or service." (applicant's appeal brief, p. 6). By contrast, applicant contends that the involved services help its client enterprises (i.e., especially sellers) to implement dynamic, customized price management using e-commerce in business-to-business transactions. According to applicant's literature, among the variables to be considered are aspects of markets, customers, channels and timing. Applicant argues that the specific combination of these variables or factors is unique to each client company. Applicant provides its clients with the infrastructure that permits them to use price as a strategic weapon. Hence, applicant argues that the enterprise benefiting from applicant's services will actually be ignoring any prevailing, "readily ascertained and publicly-known market price" (applicant's reply brief, p. 2) for merchandise, services, etc.³

In fact, after a complete review of applicant's seventeen page "White Paper" entitled "What's in a Price? Understanding B2B Pricing Techniques," one could conclude that the descriptive terms for these innovative, Internet-

³ In this context, we fail to see how the wire service story quoted by the dissenting judge herein "indicate[s] the descriptive nature of MARKETPLACE for applicant's services."

based pricing programs would be "differential pricing," "discriminatory pricing," "variable pricing," "centralized pricing," "online dynamic pricing," "optimal price," "profitable price," "efficient pricing," etc. It is a process best used in conjunction with unique products, services of all kinds, infrequent purchases and/or for high dollar volume purchases.

We do recognize that there is but a thin line of distinction between a suggestive and a merely descriptive term, and it is often difficult to determine when a term moves from the realm of permissible suggestiveness into the sphere of impermissible descriptiveness. In re Recovery, Inc., 196 USPQ 830 (TTAB 1977). However, in this case, we find that MARKETPRICE falls on the suggestive side of that line. We cannot determine, based on the evidence of record, that MARKETPRICE directly conveys information about the nature of applicant's services. Rather, we find that we agree with applicant that the traditional concept of "market price" does not convey information about this emerging area of price management in business-to-business dealings.

Decision: The refusal to register based on Section 2(e)(1) of the Act is reversed.

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Seeherman, Administrative Trademark Judge, dissenting:

Because I believe that the Examining Attorney has established that MARKETPRICE is merely descriptive of applicant's services, I dissent.

As a preliminary matter, I note that the majority opinion, although recognizing that most of the articles taken from the NEXIS database and submitted by the Examining Attorney explicitly reference applicant's proprietary goods and services, does not discuss this evidence at all. However, the articles indicate the descriptive nature of MARKETPRICE for applicant's services. See, in particular:

Revenue Technologies [applicant] will use the funds for the development and launch of MarketPrice™, the first comprehensive pricing solution designed to manage the complete pricing life-cycle from capturing market or negotiated prices through transaction execution, analysis and optimization.
"Business Wire," February 21, 2001

This article indicates that applicant's services are used to, inter alia, determine market prices. Although I recognize that the article was taken from a wire service, and therefore there is no indication that the article has received public exposure, it does show the author's view of applicant's services. Further, at the bottom of the article is contact information for Revenue Technologies. This

notation indicates that the material for the article was obtained from one of applicant's own press releases.

More importantly, it appears to me that the majority has concluded that MARKETPRICE is not merely descriptive based on an assessment of applicant's particular services, which the majority describes as "innovative, Internet-based pricing programs." However, the services as applicant has identified them in its application are not limited to Internet-based pricing programs. Rather, applicant has identified its services broadly as "professional advisory and consultation for businesses, especially, but not limited to, those with an electronic presence, in the field of product and service pricing." In other words, applicant's identified services are simply to advise and consult with businesses regarding pricing of all kinds of products and services. This identification clearly encompasses advising and/or helping businesses to determine the market price for goods or services they wish to buy or sell. MARKETPRICE is therefore merely descriptive of a characteristic of applicant's identified services.